(1982) 01 BOM CK 0021

In the Bombay High Court

Case No : Estate Duty Reference No. 2 of 1969

D.J. Gazdar APPELLANT

Vs

Controller of Estate Duty RESPONDENT

Date of Decision : 12-01-1982

Acts Referred:

Estate Duty Act, 1953 — Section 2(15), 40, 5, 7(1)

Citation : (1982) 28 CTR 174 : (1982) 138 ITR 607 : (1982) 10 TAXMAN 169

Hon'ble Judges : M.N. Chandurkar, J;M. Jagannatha Rao, J

Bench : Division Bench

Judgement

Chandurkar, J.—This is a reference made under s. 64(1) of the E.D. Act, 1953, by the Income Tax Appellate Tribunal, Bombay Branch, at the instance of the accountable person.

2. One Mr. Jehangir Jivanji Gazdar, who died in 1951, had at the time of his death half share in a property called Laxmi Vilas and the other half belonged to his wife, Bachubai. Mr. Gazdar had made a will in regard to his share in the property. Under the terms of the will it was provided that during the lifetime of his wife, Bachubai, she would be allowed to reside in the said property free of rent as long as she paid all outgoings in respect of the said property and on and after the death of his wife, his sons, Rustom and Dinshaw (in case both of them survive the deceased and his wife, Bachubai) were to reside in the said property free of rent so long as they paid all outgoings in respect of the said property including the cost of all repairs during the joint lives of the said sons, Rustom and Dinshaw. Under the will the trustee were, subject to the above-referred provisions, entitled to recover the rent and income of the said property and to pay out of the same all outgoings including the insurance premia and the cost of repairs. If there was any balance of the income, it was to be paid in equal parts to each of the two sons during their lives and in case of the death of any one of them, the moiety of such income was to be paid to the other. If the two sons could not reside in the said property together or any of them pre-deceased the

testator or his wife or on the death of any one of them, the trustees had a right in their absolute discretion to let out the said property to any one to the said sons at much reasonable rent and on such terms and conditions as the trustees in their absolute discretion deemed fit. The recitals in the will provided that the property shall not be sold : (i) during the lifetime of the wife, without her consent. (ii) after the death of the wife, without the written consent of both the sons, and (iii) after the death of the wife and any one of the sons, without the written consent of the surviving son.

3. A further clause in the will provided :

"In the event of the sale of the said property, the net sale proceeds shall be held by my trustees upon the same trusts as are hereinbefore contained in respect of the said property."

4. After the death of testator, Mrs. Bachubai lived in the house including the portion belonging to her husband and her two sons also lived with her. Bachubai died on 13th May, 1963, and the question which arose in the course of estate duty proceedings was whether the value of half share in the property called Laxmi Vilas belonging to her husband could be deemed to pass on death of Mrs. Bachubai.

5. The Asst. Controller held that the property represented by the husband''s half share passed on the death of the deceased, Bachubai, under ss. 5 and 7 of the E.D. Act. He took the view that a right to reside in the property would be an interest in the property and, therefore was "property" as defined in s. 2(15) of the E.D. Act.

6. In the appeal filed by the accountable person, the App. Controller took the view that on the death of the deceased, Bachubai, her exclusive right of residence in the property ceased altogether and, therefore, the right of residence in favour of the sons arose. This absolute right of residence in the property amounted, according to the Appellate Controller to exclusive beneficial interest in the property. Therefore, according to the Appellate Controller, the value of half the share in the property originally belonging to the husband of the deceased had been correctly included in the dutiable estate. The decision of the Madras High Court in the case of Manian Natesan and Chandran Natesan Vs. The Controller of Estate Duty, Madras, was quoted in support of the view taken by the Appellate Controller.

7. The accountable person then filed an appeal before the Income Tax Appellate Tribunal and it was contended by the appellant that Mrs. Bachubai had only a personal right to live in the property, which originally belonged to her husband, that the personal right was not transferable, that its value could not be ascertained and, therefore, it could not be treated as property passing on the death. An alternative submission was made before the Tribunal that since the right of the deceased was a limited right of residence, the value of the whole property could not be included in the dutiable estate and that only a portion

thereof, being the actual value of the said right of residence, could be included.

8. On behalf of the Department, reliance was placed on the decision of the Madras High Court referred to above and on s. 40(a) of the E.D. Act.

9. The Tribunal took the view that the right of residence was the absolute and exclusive right of the deceased, Bachubai, and in such a case, the property clearly passed on the death of the person enjoying such a right. According to the Tribunal, the only question which then remained was about the valuation of that right in the light of the provisions of ss. 40(a) and 40(b) of the E.D. Act. Reference was made by the Tribunal to s. 7 of the E.D. Act under which, according to the Tribunal, as in the present case, a property is deemed to pass only to the extent to which the benefit accrues or arises by the cesser of such interest. The Tribunal noticed contention that, according to the Department, s. 40(a) applied to the facts of the present case, while, according to the accountable person, if at all any provision was applicable, it was s. 40(b). The Tribunal accepted the contention of the Department and held that since the right of Mrs. Bachubai to residence was absolute and unqualified for her lifetime, on her death, the benefit that accrued or arose was that the property was available to the two sons free from the right of the deceased to occupy the property. The measure of the benefit which accrued, according to the Tribunal, was that the full rent of the property could be recovered from one of the two brothers, if he wanted to occupy the property, and, thus, according to the Tribunal, the benefit that accrued or arose on the death of the deceased extended to the whole income of the property and, therefore, the principal value of the property itself was includible in the dutiable estate.

10. Arising out of this order of the Tribunal, the following tow questions have been referred to this court for opinion :

"(1) Whether, on the facts and in the circumstances of the case, the value of the half share in the property known as Laxmi Vilas, which originally belonged to Shri Jehangir Jivanji Gazdar, could be deemed to pass on the death of Smt. Bachubai and, consequently, be made liable to estate duty ?

(2) Whether, on the facts and in the circumstances of the case, and on a true and proper construction of the will, the value of the benefit accruing or arising from the cesser of the interest ceasing on the death of the deceased attracted the provisions of section 40(b) of the Estate Duty Act ?"

11. Mr. Kolah, appearing on behalf of the accountable person, has contended before us that the deceased, Mrs. Bachubai, had only a right of residence under the provisions of the will and this was merely her personal right. According to the learned counsel, Mrs. Bachubai had no other interest of any monetary value which could on her death pass on to the sons and, therefore, according to the learned counsel, no part of the value of the half share in the property in question was liable to be assessed to estate duty.

12. The argument of the learned counsel for the Revenue was two-fold. Firstly, according to the learned counsel, the present case was one which fell expressly under s. 5 of the E.D. Act and, secondly, even if s. 7(1) was applicable on the ground that the property must be deemed to pass on the death of the deceased, Bachubai, because her right to residence ceased, then for the purposes of computation of the value of the interest which had ceased under s. 40(a) of the E.D. Act, the principal value of the half share of the property must be taken into account for the purposes of computation of estate duty.

11. We may at the outset mention that the learned counsel for the Revenue wanted to canvass the argument that the present was squarely covered by s. 5 of the E.D. Act on the basis of the authority of the Supreme Court in Controller of Estate Duty, Gujarat Vs. Hussainbhai Mohamedbhai Badri, , and the learned counsel wanted to contend that the words "property passing on the death of the deceased" occurring in s. 5 of the Act meant a change in the beneficial interest and not title and to ascertain whether the property has passed, a comparison must be made between the persons beneficially interested the moment before the death and the persons so interested the moment after the death. On this test laid down by the Supreme Court, according to the learned counsel, as a result of the death of Mrs. Bachubai, the beneficial interest in the property passed on to the two sons and, therefore, there was a passing of property as contemplated by s. 5 of the E.D. Act and there was, therefore, no reason for the Department to place reliance on the provisions of s. 7 of the E.D. Act.

12. Such an argument advanced on the basis of the applicability of s. 5 of the E.D. Act appeared to us to be outside the scope of the reference because when the Tribunal decided the matter by the order out of which the reference arises, the Tribunal has expressly dealt with the provisions of 40(a) of the Act and has treated the present case as one which is governed by s. 7 of Act, which will be clear from the following observations in the order of the Tribunal :

"Section 7 clearly provides that in the case of an interest ceasing on the death of the deceased, as in the present case, property is deemed to pass only to the extent to which a benefit accrues or arises by the cesser of such interest. Section 40 provides the formula which is to be applied in the determination of the value of property to be included...The departmental representative contended that section 40(a) applied to the present case, whereas the learned counsel contended that section 40(b) applied if at all."

13. It is, therefore, clear that when the two questions were referred, the reference was made on the footing that the property was deemed to pass on the death of Mrs. Bachubai as will also be clear from the manner in which question No. 1 has been worded. The scope of the reference must, therefore, be restricted to the determination of the question as to whether any property could be deemed to pass on the death of Mrs. Bachubai and if so, whether such property was made liable to estate duty under s. 40(a) or under s. 40(b). Any discussion with reference to the passing of property within the meaning of s. 5 would be

wholly outside the scope of the reference and we, therefore, did not permit Mr. Joshi to proceed with his argument founded on s. 5 of the E.D. Act.

14. Now, section 7(1) of the Act provides as follows :

"Subject to the provisions of this section, property in which the deceased, or any other person had an interest ceasing on the death of the deceased, shall be deemed to pass on the deceased''s death to the extent to which a benefit accrues or arises by the cesser of such interest, including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law."

15. We are not concerned in this reference with sub-ss. (2) to (4) of s. 7, nor are we concerned with the inclusive portion in s. 7(1).

16. The word "property" has been defined in s. 2(15) of the Act as follows :

"''Property'' includes any interest in property, movable or immovable, the proceeds of sale thereof and any money of investment for the time being representing the proceeds of sale and also includes any property converted from one species into another by any method."

17. The definition of property is an inclusive definition and any interest in property is to be treated as property for the purposes of s. 7(1). It would, therefore, be difficult to accept the argument made on behalf of the accountable person that a right of residence is not an interest in property merely because the clauses of the will did not provide for any monetary benefit.

18. Now, s. 7(1) specifies the extent of the property which must be treated as having passed in a case where an interest ceases on the death of the deceased. Under that section the property in which the deceased had an interest ceasing on his death shall be deemed to pass on the death of the deceased to the extent to which a benefit accrues or arises by a cesser of such interest. There is no doubt that as a result of the cesser of the interest of the deceased, a benefit has arisen in the sense that the property has become freed of the right of the widow to reside free of cost.

19. Now, when we go back to the charging provision in s. 5, it provides that the estate duty which is to be levied and paid is to be upon the principal value ascertained as provided in the Act. It is not in dispute that the relevant provision for the determination of the principal value of the benefits accruing as a result of an interest ceasing on death is in s. 40, which provides as follows :

"The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall -

(a) if the interest extended to the whole income of the property, be the principal value of that property; and

(b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

20. Reading s. 7(1) and s. 40 together, it is clear that in order that any property must become liable to the charge of estate duty, in so far as s. 7 is concerned, there must be a cesser of interest on the death of the deceased and benefit must accrue or arise by the cesser of such interest and the value of the benefit so accruing or arising must be capable of valuation in the manner provided by s. 40. Merely on the ground that there is a cesser of interest and a benefit has accrued or arisen from the cesser of interest on the death of the deceased, no liability to pay estate duty will arise unless in so far as s. 7 is concerned, read with the charging provision in s. 5, the computation of the value of such benefit is possible in the manner provided by s. 40. A natural corollary of this would be that, where, as a result of a cesser of interest, a benefit accrues or arises, but such benefit is incapable of valuation in the manner provided by s. 40, there will be no liability for the purposes of the E.D. Act.

21. Now, when we go to the provisions of s. 40, cl. (a) thereof provides that if the interest which has ceased on the death of the deceased extends to the whole income of the property, then the value of the benefit accruing or arising from the cesser of such interest is the principal value of that property. Therefore, what is required to be found out when under s. 7 an interest is said to have ceased is whether that interest extended to the whole income of the property.

22. Now, it is not in dispute that when the deceased, Bachubai had a right of free residence in the property, her interest did not relate to the whole income of the property or for the matter of that any income of the property at all. What is, however, contended by Mr. Joshi is that we must so read cl. (a) of s. 40 that where there is a right of free residence in property, that right must be equated with a right to receive income from that property if the property would have been let out. We see no warrant for this kind of construction of the provisions of s. 40(a). There is no ambiguity at all in cl. (a) of s. 40. It is obvious that s. 40, cl. (a), was intended to provide only for that kind of case where the interest, which had ceased, extended to the whole income of the property. When we read cl. (b) we find that it is intended to deal with the valuation of the benefit accruing from the cesser of an interest in a case where the interest extended to less than the income of the property. Therefore, one of the essential requirements for invoking the provisions of s. 40 when one wants to compute the value of the benefit, accruing or arising from the cesser of an interest, is that the interest must extend to the whole or part of the income of the property. An interest can be said to extend to the whole or less than the whole income of the property only, when by virtue of the interest, a person is entitled to either the whole or part of the income of the property. The will did not create any interest which extended to any income of the property. The provision in the will merely provides for a right of residence which cannot be treated as a right extending to any income of the property. If the right of free residence cannot be treated as an interest which

extends to any income of the property, it is difficult for us to see how the valuation of the benefit accruing or arising out of the cesser of such interest, namely, the right of free residence, can be computed in accordance with the manner prescribed under s. 40 of the Act. Indeed, it appears to us that even if a right of free residence is treated as interest in the property on the death of the person in whose favour that right is created and even if a benefit may have accrued as a result of the cesser of such interest, the benefit is incapable of valuation and the value of half the share of the house in respect of which the right of free residence was created cannot be taken as the value of the benefit in the instant case. It appears to us to be clear on the provisions of s. 40 that even though for the purposes of sub-s. (1) there may be a cesser of interest and a benefit accruing or arising from such cesser, if the benefit cannot be valued in the manner prescribed by s. 40, the cesser of interest will be irrelevant for the purposes of the liability under the E.D. Act. Heavy reliance was placed both by the Appellate Tribunal and the learned counsel for the Revenue on the decision of the Madras High Court in Manian Natesan and Chandran Natesan Vs. The Controller of Estate Duty, Madras, If that decision is carefully read, it will be clear that the question as to whether the provisions of s. 40(a) are attracted in a case where the nature of the interest, which had ceased, was a right of free residence did not fall for the consideration of the Madras High Court at all. It was vehemently urged before us by Mr. Joshi that the facts in that decision and those in the present case are identical. Assuming that that is so, the question which was referred to the Madras High Court did not arise out of any construction of the provisions of s. 40(a) at all. The facts in that case were that by a will, provision was made that the wife of the testator would be entitled to live in the separated and demarcated main building, namely, Mangala Vilas, for her life and the testator had expressly desired that his two sons with their family should live with the wife amicably but that if for any reason differences arose between them, they should remove themselves to the houses separately allotted. After the lifetime of the wife, the bungalow was to be enjoyed by the two sons for life in equal shares. The two sons were given a power to sell the bungalow if a good price would be offered, but previous consent and concurrence of the wife was necessary for the sale. The sale proceeds were to be invested in the purchase of other houses or in approved securities and the dispositions made in the will "as to the original property shall govern the substituted property or other investment made out of the proceeds of the original property". The testator died on 10th January, 1949. His widow died on 25th October, 1954. The Asst. Controller held that there was passing of property on the death of the widow and valued the property under s. 40(a) of the E.D. Act. The appeal of the accountable persons, namely, the sons, was dismissed by the CBR and the following question was referred to the Madras High Court in a reference :

"Whether, on the facts and in the circumstances of the case, the property known as ''Mangala Vilas'' was correctly included in the estate of the deceased as property passing on her death ?"

23. The Madras High Court took the view that the cesser of the interest of the lady in the property by reason of her death led to a corresponding benefit which accrues to the two accountable persons, namely, her sons and under the terms of s. 7 of the E.D. Act, the right of residence in the property was property which is deemed to pass on the death of that person and if so, the principal value of the property ascertained according to the provisions of the Act could be made subject to the levy of estate duty. The Madras High Court rejected the argument of the accountable persons that the sons had a joint interest along with the widow in the property in question and observed that "section 2(15) of the Act defines property so as to include any interest in the property which should certainly include the right of residence as well". The learned judges then went on to observe that the widow''s interest in the property was property which passed on death within the meaning of either s. 5 or s. 7 of the E.D. Act. The learned judges then proceeded to observe that s. 40 provided for a mode of valuation of benefits from interest arising on death and then observed as follows (p. 7) :

"Broadly it is sufficient for our purposes to state that if the interest possessed by the deceased extended to the whole income of the property, then the value of the benefit would be the principal value of that property. If the widow had the exclusive right of residence in the property, the sons, even if they also enjoyed the property, could do so only by licence and it necessarily follows that the widow was entitled to the entire income from the property. Her interest did extend to the whole of the income from the property and the valuation could rightly be made u/s 40(a) of the Act. That point does not really arise out of the question raised. We refer to it incidentally as the question was argued by learned counsel." (Underlining ours).

24. The concluding part of the observations in the judgment will clearly show that even according to the Division Bench, the question as to whether the interest of the widow extended to the whole income of the property and whether the valuation in such a case could be made under s. 40(a) of the Act did not arise out of the question which was referred. This decision, therefore, cannot be treated as an authority, as the Tribunal has done, for the proposition that where there is a right of free residence, such interest must be treated as extending to the whole income of the property.

25. In the view which we have taken, that if the value of the benefit arising out of cesser of interest cannot be computed in terms of s. 40(a) of the E.D. Act, then no liability to estate duty arises on such cesser of interest, we are supported by a Division Bench decision of this court consisting of Madon and Mrs. Sujata Manohar JJ. in Estate Duty Reference Nos. 2 of 1973, 2 of 1974 and 9 of 1979 Controller of Estate Duty, Bombay City-I Vs. Fakirchand Fatehchand Sachdev, . One of the propositions laid down by the Division Bench in that case was as follows (p. 307) :

"Where property is deemed to pass under s. 7(1) of the E.D. Act, 1953, estate duty thereon will be chargeable under s. 5, but the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased will have to be computed under s. 40 of the Act, and if it cannot be computed, then such benefit is not liable to the charge of estate duty."

26. The Division Bench also held that in a case which falls under s. 7(1), the computation of the value can only be done under s. 40 of the Act and not by any other mode of valuation. To the same effect is the decision of the Gujarat High Court in Mrudula Nareshchandra Vs. Controller Estate of Duty, , in which the Gujarat High Court has observed as follows after referring to the provisions of ss. 7 and 40 of the E.D. Act (p. 314) :

"While construing these sections, the basic principle which should be borne in mind is that the primary, and, rather the main, object of every taxing statute is to recover a tax or a duty in cash on the happening of a particular taxable event. That event so far as the Estate Duty Act is concerned, is the actual or deemed passing of property on the death of a person. Again, every taxing statute contemplates the levy of a tax or duty on the valuation which is arrived at on the principles enunciated in the statute itself. It is, therefore, apparent that if valuation principles stated in the statute cannot be worked out with precision, it would follow, as a necessary corollary, that the property, which is required to be valued, is not the one which is intended to be subject to tax or duty contemplated by the statute."

27. It was then further observed as follows (p. 315) :

"Section 7 deems an interest to pass if the same ceases on death. The section thus makes the property exigible to duty if there is a cesser of interest on death. But the extent of this eligibility to duty is ''the extent to which a benefit accrues or arises by the cesser''. Therefore, the tax liability is made co-extensive with the extent of the benefit. Thus, in order to assess the tax liability, the value of benefit so accruing or arising has to be worked out. It is at this stage that section 40 steps in, and provides a basis on which this valuation can be worked out....Section 40 thus clearly postulates that the property in which the interest has ceased must be capable of yielding income, because, unless it is so capable, the interest, which has ceased, cannot be said to be extending either to the whole or to less than the whole of the income within the meaning of section 40. In other words, if the property in which the interest has ceased to exist has no inherent potentiality to yield any income, standing by itself, it would not be possible to evaluate the benefit accruing or arising from the said cesser under any of the provisions of the Act including section 40. To put it differently, the cesser of such interest is not made exigible to duty."

28. It, therefore, appears to us that the Tribunal was not justified in relying on the decision of the Madras High Court in Manian Natesan and Chandran Natesan Vs. The Controller of Estate Duty, Madras, and on the view which we have taken, even though there was a cesser of interest, the benefit arising therefrom was not exigible to duty because the provisions in s. 40(a) of the E.D. Act did not

contemplate a computation of the value of such a benefit.

29. Accordingly, question No. (1) referred to us is answered by holding that though there was a cesser of interest and property could be said to be deemed to pass, the benefit accruing therefrom would not be liable to estate duty. In view of our answer to question No. (1), question No. (2) does not arise and need not be answered. The costs of the reference will be paid by the Revenue.

